

IN THE DISTRICT COURT OF )  
THE METROPOLITAN DISTRICT )  
HOLDEN AT SYDNEY. )

BEFORE HIS HONOR JUDGE MARKELL.

Wednesday, 20th March, 1940.

SARGENT v. CAM & SONS, PTY. LIMITED.

JUDGMENT.

HIS HONOR: The plaintiff in this action is seeking to recover from the defendant company certain sums of money which he claims are due to him upon a balance of account as master of the S.S. "Tuncurry" for wages and overtime under the provisions of a Commonwealth industrial award.

The defendant is the owner of the S.S. "Tuncurry", and by an agreement dated November 1, 1938, it purported to hire the said vessel to the plaintiff and eight other persons upon the terms appearing therein.

This agreement remained in force until 31st March, 1939, so that the relevant period is from 1st November, 1938 to the latter date.

The said agreement provided briefly that the defendant hired the "Tuncurry" to the plaintiff and his fellow contractors - therein referred to as the partnership - the partnership undertaking to use the said ship only for the purpose of carrying such cargoes of coal as might be found by the defendant



from Swansea to Sydney.

The partnership was to receive from the defendant £11.10.0 together with 10/- mooring allowance per trip from Sydney to Swansea and back, provided the vessel on the return journey carried approximately 150 tons of coal, and, in addition, in certain events the partnership was to get 5% of what is referred to in the agreement as the earnings. 5

I shall refer more particularly to certain other provisions of the agreement later in my judgment. 10

It is claimed on behalf of the defendant company that the effect of this agreement was to make the plaintiff and the other members of the partnership independent contractors and that they were in no sense employees of the defendant. On the other hand the plaintiff contends that the agreement is merely a colourable sham and that in fact he was employed with the others by the defendant to navigate the vessel from Sydney to Swansea and back and that therefore he comes within the terms of the award above referred to and is entitled to the wages and overtime claimed. 15 20 25

It is not denied that if the plaintiff be found to have been an employee of the defendant he comes within the award and would be entitled to such payments. 30

I feel no doubt that the agreement was entered into by the defendant for the



purpose, if possible, of evading the award, but this motive on the part of the company is immaterial unless the plaintiff was in fact employed by it.

The decision as to whether, in certain circumstances, a person is an independent contractor or an employee is often a matter of great nicety, the decisive factor being the amount of control exercised or exercisable by the alleged employer.

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In the present case the relationship between the parties is to be determined by a careful consideration of the terms of the agreement made between them and their conduct whilst it was in force.

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In my opinion a scrutiny of the alleged hiring agreement can only lead to the conclusion that the relationship between the plaintiff and the defendant was that of employee and employer.

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In the first place, although the plaintiff purported to hire the defendant's vessel, he was not paying anything for that privilege, but instead had cast upon him the duty of carrying the defendant's coal from Swansea to Sydney, receiving for that service an amount which may well be described as a wage to be divided between him and his fellows, who, in fact, constituted the crew of the said vessel.

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The partnership could carry the defendant's coal only, and was bound to do so



efficiently and expeditiously and the company might cancel the contract at any time by seven day's notice in writing.

In fact, practically every clause in the agreement confers upon the defendant powers which, in my opinion, are only consistent with the exercise by it of that control over the plaintiff which is necessary to create the relationship of master and servant. In addition to this, the actions of the defendant company, while the agreement was in force, such as the giving of the orders referred to in Exhibit F, leads me to the same conclusion. I therefore find that the plaintiff during the relevant period was in fact an employee of the defendant company and that the provisions of the said award apply to him.

The only evidence as to the hours and overtime worked is that of the plaintiff, but I have formed the opinion that he is a truthful and reliable witness, and I am therefore prepared to accept his testimony on this point.

I find a verdict for £202.15.6 in favour of the plaintiff.

H.J. Markell,  
1/4/40.